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No. 08-526

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

YONG LI,

Petitioner,

v.

RAYTHEON COMPANY, IAN C. MITCHELL, AND ARTHUR BULIUNG,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Dated: November 21, 2008

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QUESTIONS PRESENTED

1. Whether summary judgment for respondent Raytheon Company was warranted on Petitioner's retaliation claim under Title VII of the Civil Rights Act of 1964 where the actions complained of that occurred within the limitations period did not constitute actionable adverse actions.

2. Whether summary judgment for respondent Raytheon Company was warranted on Petitioner's retaliation claim under Title VII of the Civil Rights Act of 1964 where the evidence was insufficient to support an inference of a causal connection between Petitioner's protected activity and the Company's alleged adverse actions.

3. Whether summary judgment for respondent Raytheon Company was warranted as to a portion of Petitioner's retaliation claim under Title VII of the Civil Rights Act of 1964 on statute of limitations grounds where Petitioner was apprised of the alleged falsity of the alleged retaliatory statements outside the limitations period.

LIST OF PARTIES AND RULE 29.6 STATEMENT

The parties named in the caption, Yong Li, Raytheon Company, Ian C. Mitchell, and Arthur Buliung, were the only parties to the proceedings before the court of appeals and the district court. Raytheon Company has no parent companies, and there are no publicly-held companies that own ten percent or more of its stock.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents, Raytheon Company, Ian C. Mitchell, and Arthur Buliung, respectfully oppose the petition for writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit.

OPINIONS BELOW

As stated by Petitioner.

JURISDICTION

As stated by Petitioner.

STATUTES INVOLVED

Respondents contend that only 42 U.S.C. § 2000e-3(a) is involved and relevant to the petition. Petitioner's citation to 42 U.S.C. § 2000e-2(a) is improper as the petition does not involve any issue under Section Two of the statute.

STATEMENT OF THE CASE

Factual Background.

Respondents provide the following supplementation to Petitioner's description of the factual background.

Petitioner was hired by Raytheon Company ("Raytheon") as a Senior Software Engineer in the company's Network Centric Systems ("NCS") busi-

ness unit on or around January 5, 1998. (Pet. at 4a). In July 2001, Petitioner had a disagreement with a co-worker over the proper methodology to be used in a software design project. (*Id*). Jennifer Lewis, Petitioner's supervisor at the time, determined that both proposed methodologies were viable but indicated that deference should be given to the co-worker's methodology because she was ultimately responsible for the success of the project. (*Id.*)

Over a year later, in October 2002, Petitioner complained to Raytheon that she had been subjected to "discrimination" by Ms. Lewis after the 2001 disagreement with her co-worker. (*Id.*). Specifically, Petitioner alleged that Ms. Lewis treated her unfairly in failing to give her proper credit on the software design project. Raytheon investigated Petitioner's complaint several times (at Petitioner's request) and concluded that there was no evidence supportive of Petitioner's complaint of discrimination against Ms. Lewis. (Pet. at 4a – 5a).

In March/April 2003, Li was assigned to a Raytheon project in Virginia and temporarily relocated to the area to work on that project. (*Id.* at 5a). In December 2003, Petitioner's work on the project in Virginia was coming to an end, and her Section Manager, Scott Oglesby, assisted in finding her next assignment. (*Id.* at 121a).

In 2004, Mr. Oglesby worked to find as much work as possible in the Company's business units for all members of his section affected by the lack of contract funding, including Petitioner. (*Id.* at 121a, 150a). During this period, Mr. Mitchell, Petitioner's

department manager, also attempted to find work for Petitioner. (*Id.* at 85a-86a). In June 2004, Petitioner found a position working on the Company's ERAM project, which did not require a security clearance. (*Id.* at 5a).

Starting in July 2004, Petitioner started sending a series of disturbing internal e-mails. (Pet. at 5a-6a). On July 17, 2004, Petitioner sent an e-mail to a number of Asian co-workers (and Ms. Ervin) complaining about her treatment at Raytheon by her supervisors, including an alleged "conspiracy" by management to push her out of Raytheon. (*Id.* at 5a, 127a).

On July 19, 2004, Ms. King, Mr. Buliung, and Stephanie Kolenski (a Human Resources Generalist supporting Software Engineering) met with Petitioner to attempt to understand her concerns as expressed in the July 17th e-mail and resolve the situation. (*Id.* at 150a). They discussed her job situation including the ERAM program placement, and explained that the primary reason it was not easy to place her was the fact that she did not have a security clearance. (*Id.*).

On July 29, 2004, Petitioner sent an email to Mr. Buliung, noting a recent conversation she had with Mr. Oglesby. (*Id.* at 130a). Petitioner wrote, in part, "I told Scott [Oglesby] that if anything happened on me or on my family, don't believe that it's an accident, it may be a 'murder'!"

On August 2, 2004, Petitioner sent an email to Mr. Buliung, attaching previous email exchanges

with Mr. Mitchell. (*Id.* at 123a). Petitioner wrote "This is the e-mail I sent to Ian Mitchell originally, you can see what he replied, he didn't feel any surprise about how Scott treated, mazz [sic]? Some men are really dirty!"

On August 3, 2004, Mr. Buliung and Ms. Kolenski met with Petitioner to discuss her recent emails and to suggest that she meet with John Didio, a counselor from the Employee Assistance Program offered by the Company. (Pet. at 5a). Neither Mr. Buliung nor anyone else at Raytheon had supervision or control over Mr. Didio's work or evaluation of Petitioner. (*Id.* at 70a).

Petitioner agreed to meet with Mr. Didio. At the meeting, Mr. Didio told her that their conversation would remain confidential and that she should speak freely. (Pet. at 120a). Mr. Didio explained to her, in some detail, about the EAP and indicated that he was there to assist her in any way possible. (*Id.*). Mr. Didio read Petitioner's July 29, 2004 email with the "murder" reference, and asked if she was afraid of anyone working at Raytheon. (*Id.*). She responded "Jen Lewis," because Ms. Lewis allegedly stared at her in the hallway. (*Id.*). Mr. Didio also asked Petitioner if she wanted to harm anyone at Raytheon (he tried to explain this was part of his standard questioning) to which she responded angrily, "How can you say that to me?" She went on to say that she is "the victim here." (*Id.*). The meeting ended soon after this exchange. (*Id.*).

On August 8, 2004, Petitioner sent an email to the Raytheon Asian Pacific Employees Association

("RAPA") and Mr. Buliung, in which she claimed that Mr. Didio insulted her in their August 3rd meeting. (Pet. at 131a). The following day, Mr. Buliung and Ms. Kolenski met with Petitioner to discuss the RAPA email, and to inform her that company mass email distribution was not to be used for personal concerns. (*Id.* at 97a, 132a). They also pointed out that Mr. Didio did not behave as Petitioner accused in her email. Petitioner agreed and also agreed not to use Company email for personal use. (*Id.*).

Shortly thereafter, Mr. Buliung and Ms. Kolenski again met with Petitioner and Ms. King. (*Id.* at 54a). In addition, at Petitioner's request, another employee of Asian descent, Ed Tang, was invited to act as an interpreter should the need arise for clarification of the conversation. (Pet. at 72a-73a). Based upon their discussions, the Company once again believed that these meetings resolved any outstanding concerns expressed by Petitioner. (*Id.* at 73a).

However, on August 30, 2004, Petitioner sent a mass e-mail (which was copied to William Swanson, Chairman & CEO of Raytheon Company), in which she claimed that "John Didio with his professional skill poisoned my brain, he treated me, a victim as a potential murder, this is an evil behavior! As I'm sitting in my office and working, but quiet offenly [sic], I want to scream!!!" (*Id.* at 6a).

The following day, August 31, 2004, Raytheon determined that Petitioner should be placed on paid administrative leave and that she be provided with a professional psychological evaluation to assist her

and determine her fitness to return to work. (*Id.* at 6a, 74a).

Following approximately four weeks of paid administrative leave, in early October 2004, Petitioner applied for STD insurance benefits to MetLife, Raytheon's plan administrator, and was initially approved. (Pet. at 54a-55a). The STD and LTD benefit plans for Raytheon employees are administered by MetLife; therefore Raytheon played no role in making the benefits determination with respect to Petitioner's application. (*Id.* at 6a, 54a-55a). While on STD, Petitioner was allowed time off pursuant to the Family Medical Leave Act ("FMLA") and placed in a medical leave status. Based on Petitioner's failure timely to submit documentation required by MetLife to substantiate her continued need to remain on disability benefits, MetLife terminated Petitioner's STD coverage as of November 22, 2004. (*Id.* at 55a).

In light of the termination of Petitioner's STD benefits coverage by MetLife, Ms. Kolenski notified Petitioner in writing on November 30, 2004 that she would need to return to work by mid-December 2004. (*Id.* at 55a, 143a). Ms. Kolenski also requested that Petitioner make Raytheon aware of any "extenuating circumstances" that would affect the date set by the Company for her to return to work. (*Id.* at 143a). In response to this letter, on December 3, 2004, Petitioner called Ms. Kolenski and asked her "What if I wanted to kill you?" (*Id.* at 6a & n.1, 115a).

On January 17, 2005, Ms. Kolenski notified Petitioner that her employment would be administratively terminated effective January 21, 2005 on

the grounds that her FMLA leave period had expired and she failed to provide a return to work date. On January 22, 2005, having failed to return to work or provide documentation of a continuing disability, Petitioner was administratively terminated from the Company. (Pet. at 56a).

In April 2005, following her successful appeal of MetLife's November 2004 denial of benefits determination, Petitioner's STD benefits were approved and her coverage was extended through January 5, 2005. Her Long Term Disability (LTD) insurance claim also was approved for coverage beginning January 6, 2005. Raytheon human resources representatives were not made aware of these developments until May 18, 2005. (*Id.*).

Based on MetLife's reversal of its November 2004 STD benefits denial, Raytheon reinstated Petitioner to a medical leave status, and informed her of the change in status on May 20, 2005. (*Id.*).

Proceedings Below.

As stated by Petitioner. Further, the relevant decisions and orders below were not reported.

REASONS FOR DENYING THE PETITION

I. IT IS NOT NECESSARY IN THIS CASE TO REACH THE ISSUE OF WHETHER THE ALLEGED RETALIATORY DIVERSE ACTION WAS CAUSALLY CONNECTED TO PETITIONER'S PROTECTED ACTIVITY BECAUSE THE ENTRY OF SUMMARY JUDGMENT FOR THE RESPONDENT WAS WARRANTED ON A SEPARATE AND INDEPENDENT GROUND.

This Court should deny the petition because summary judgment was warranted on the separate and independent ground that the evidence was insufficient to support a finding that the alleged retaliatory actions complained of were materially adverse to Petitioner and therefore actionable.

Specifically, Petitioner alleges that she sustained certain adverse actions during the limitations period (after June 25, 2004) which were retaliatory in nature, including Raytheon's treatment of her at an August 2004 meeting with an EAP counselor, the Company's decision to place her on administrative leave at the end of August 2004, the Company's alleged withholding of a psychiatrist's report regarding her fitness to return to work, and the Company's involvement in her short-term disability benefits application process.

This Court has held that to be actionable in the context of a Title VII retaliation claim, an adverse action must be "materially adverse" in that the

action "well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." *Burlington Northern and Santa Fe Railway Company v. White*, 548 U.S. 53, 68 (2006) (Internal citations omitted). None of Raytheon's allegedly adverse actions rise to this "materially adverse" standard.

First, Raytheon's recommendation that Petitioner meet with EAP counselor John Didio in August 2004, standing alone, does not constitute materially adverse action. Further, there is no evidence to suggest that the Company's representatives, as opposed to Mr. Didio, said or did anything at the meeting that could reasonably be construed as adverse. Mr. Didio was not employed by Raytheon; he worked for the Company's EAP vendor which provided, among other services, counseling to the Company's employees. (Pet. at 5a, 70a).

Second, there is no evidence to suggest that Raytheon's decision to put Petitioner on administrative leave for medical reasons at the end of August 2004 constituted a materially adverse action. Indeed, Petitioner has not alleged that she should not have been placed on administrative leave and, in fact, saw a psychiatrist at the Company's request.

Third, there is no evidence to suggest that Raytheon withheld a psychiatrist's report regarding her fitness to return to work. The report in question was authored by Dr. Julia Reade, who Petitioner saw in October 2004. Petitioner admits that the Company provided a copy of Dr. Reade's report to her primary care physician. (Pet. at 9 & n.7). Therefore,

Petitioner cannot show that Raytheon withheld Dr. Reade's report or that its disclosure of the report (to her primary care physician) constituted a materially adverse action. Further, there is no basis to suggest that Raytheon's decision to disclose the report to Petitioner's primary care physician (as opposed to Petitioner directly or her Chinese doctors) constituted a materially adverse action.

Finally, there is no evidence to support Petitioner's claim that Raytheon "hindered [her] short term disability [benefits] application," or that the Company's involvement in her short term disability ("STD") application process constituted a materially adverse action. (*Id.* at 17). Petitioner's STD benefits are administered by MetLife, not by Raytheon. (*Id.* at 6a, 54a-55a). MetLife is the sole decision-maker concerning Petitioner's application for benefits. (*Id.*). Additionally, there is no evidence that Petitioner suffered any harm because it is undisputed that she received STD and LTD benefits. (*Id.* at 56a). Based on the foregoing, there is no evidence to suggest that Raytheon's involvement in her short term disability benefits application process constituted action that "well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." *White*, 548 U.S. at 68.

II. THE ISSUE OF WHETHER TEMPORAL PROXIMITY BETWEEN THE PROTECTED CONDUCT AND THE ALLEGED RETALIATORY ACT IS REQUIRED TO ESTABLISH CAUSATION IS NOT RIPE FOR REVIEW BECAUSE THE DECISION OF THE COURT OF APPEALS IN THIS CASE IS NOT IN CONFLICT WITH THAT OF OTHER COURTS OF APPEALS.

In the first question set forth in the petition, Petitioner contends that the decision of the court of appeals to affirm summary judgment on her retaliation claim conflicts with the decisions of three other courts of appeals as to the type and sufficiency of evidence required to establish the causal element of a prima facie case of retaliation under Title VII of the Civil Rights Act of 1964. Specifically, Petitioner contends that, unlike the rulings of three other courts of appeals, the court of appeals in this case ruled that temporal proximity between the protected activity and the alleged retaliatory act is necessary, as a matter of law, to maintain the causal element of a prima facie case of retaliation under Title VII. (Pet. at 17). This contention is incorrect. In its decision below, the court of appeals stated that "[g]aps of months and years *weaken* any inference of a causal connection." (emphasis supplied). This statement demonstrates that it was the ruling of the court that while temporal proximity was a factor to be considered in determining whether adequate evidence of the causal connection exists, it was not required. The court's statement indicated that the inference of a causal connection would be weakened by the ab-

sence of temporal proximity, but that this absence was not necessarily fatal and could be overcome by other evidence. (Pet. at 7a) This ruling is consistent, and not in conflict, with the decisions of the three courts of appeals the Petitioner points to. See *Kachmar v. Sungard Data Systems, Inc. et al.*, 109 F.3d 173, 177 (3d Cir. 1997); *Dixon v. Gonzales, et al.*, 481 F.3d 324, 333 (6th Cir. 2007); *Porter v. California Dep't. of Corr.*, 419 F.3d 885, 895 (9th Cir. 2005).

III. IT IS NOT NECESSARY IN THIS CASE TO DECIDE WHETHER TEMPORAL PROXIMITY BETWEEN THE PROTECTED CONDUCT AND THE ALLEGED ADVERSE RETALIATORY ACTION IS REQUIRED TO SATISFY THE CAUSAL CONNECTION ELEMENT BECAUSE THE PETITIONER ADDUCED NO ALTERNATIVE EVIDENCE THAT WOULD SUPPORT A FINDING OF CAUSATION

Petitioner contends that the court of appeals erred in ruling that there must be temporal proximity between the protected conduct and the alleged retaliatory acts to support the necessary inference of a causal connection. Petitioner goes on to argue that this ruling was in conflict with that of other circuits, suggesting that if the alleged different rule from those other courts of appeals was applied, summary judgment would not have been warranted. The evidence here, however, is insufficient to support the necessary causal connection inference under any reading of the law.

Specifically, this Court and the courts of appeals for the First, Third, Sixth, and Ninth Circuits all have ruled that temporal proximity between the protected activity and the alleged retaliatory act is relevant to the causal element of the prima facie case "because this is an obvious method by which a plaintiff can proffer circumstantial evidence sufficient to raise the inference that her protected activity was the likely reason for the adverse action." *Kachmar,* 109 F.3d at 177. *See also Breeden,* 532 U.S. at 273-74; *Dressler,* 315 F.3d at 79-80; *Dixon,* 481 F.3d at 333; *Porter*, 419 F.3d at 895.

Notwithstanding the relevance of temporal proximity to the causation analysis, however, the courts of appeals for the Third, Sixth, and Ninth Circuits have expressly ruled that a longer time interval between the protected activity and the alleged retaliatory act is not fatal to the causation element of the prima facie case where there are valid reasons why the adverse action was not taken immediately, such as, for example, where during the intervening interval the alleged harasser did not have an opportunity to retaliate against the plaintiff. *See Kachmar,* 109 F.3d at 177; *Dixon,* 481 F.3d at 335; *Porter,* 419 F.3d at 895; *Ford v. General Motors Corp.*, 305 F.3d 545, 552 (6th Cir. 2002).

In *Dixon*, an African-American former agent of the FBI sued the Attorney General, alleging, among other things, retaliation in violation of Title VII for complaining of racial discrimination. On appeal to the Sixth Circuit, the plaintiff argued that the district court erred by focusing narrowly on the ten-year period that elapsed between his protected

activity and the adverse action taken by his alleged harasser. *Dixon,* 481 F.3d at 335. The plaintiff argued that a finding of causal connection was not foreclosed in his case because the alleged harasser did not have the ability to retaliate against him until the alleged harasser's views on the plaintiff were solicited as part of a reinstatement decision – ten years after the protected activity.

The Sixth Circuit ruled that a ten-year gap in time is not dispositive of the causation requirement. *Id.* The Court found, however, that the plaintiff's argument nonetheless failed because there was insufficient evidence to raise an inference that the alleged harasser's negative recommendation likely caused the denial of his reinstatement to the FBI, or that it was even retaliatory in nature. *Id.* at 336. The Sixth Circuit also noted that there was no evidence that the alleged harasser sought to retaliate against the plaintiff. *Id.*

In *Porter*, the Ninth Circuit analyzed a record with relevant facts that were similar to those considered by the Sixth Circuit in *Dixon*. Specifically, the plaintiff in *Porter* brought suit alleging that she was retaliated against because she complained about sexual harassment. *Porter,* 419 F.3d at 887. The plaintiff reported her complaints in 1995 but the alleged retaliation – the denial by the plaintiff's alleged harasser of her various requests for transfers – did not occur until 1998. *Id.* at 887-89. The Ninth Circuit concluded that the multi-year gap between the plaintiff's protected activity and the adverse employment action did not defeat a finding of a causal connection because the plaintiff's harasser did not

have the opportunity to retaliate until he was given responsibility for making personnel decisions in 1998. *Id.* at 895.

Similarly, in *Ford*, the plaintiff alleged that his supervisor retaliated against him as a result of the plaintiff's filing of a race discrimination charge with the EEOC. For a five-month period following his EEOC filing, the plaintiff voluntarily worked in a different position and was not within his supervisor's sphere of authority. *Id.* at 550. When the plaintiff was placed back under his supervisor's direction, the supervisor allegedly retaliated by imposing an increased workload on plaintiff, subjecting his performance to heightened scrutiny, and threatening to terminate him. *Id.* at 550-51. The Sixth Circuit determined that the five-month interval between the protected activity and the adverse actions did not foreclose a finding of a causal connection because the plaintiff was under the control of a different supervisor during this period. *Id.* at 554-55.

Petitioner asserts that similar "valid reasons" exist to explain the two year gap between her protected activity and Raytheon's alleged adverse action, specifically her absence from the Massachusetts facilities of Raytheon during her year-long assignment to Raytheon's Langley, Virginia facility. (Pet. at 17). However, unlike in the *Dixon, Porter,* and *Ford* cases, in this case there was no evidence that the individual who was the subject of Petitioner's race discrimination complaint in 2002 – Jennifer Lewis – played *any* role in the alleged retaliatory events that occurred within the limitations period in 2004. It is undisputed that Ms. Lewis was not in-

volved in the August 2004 meeting with the EAP counselor, the decision to place Petitioner on administrative leave at the end of 2004, the issues surrounding Dr. Reade's report in the fall of 2004, or Petitioner's short-term disability benefits application in late 2004 and early 2005. Thus Petitioner's separation from Mr. Lewis as a result of her year-long assignment in Virginia does not support the application of the exception to the temporal proximity requirement that the courts in the *Dixon, Porter,* and *Ford* cases recognized.

IV. THIS CASE WOULD NOT PRESENT A FULL OPPORTUNITY TO CONSIDER WHETHER TITLE VII SUITS ARE AMENABLE TO A DISCOVERY RULE BECAUSE THE UNDISPUTED EVIDENCE IN THIS CASE INDICATES THAT THE PETITIONER WAS APPRISED OF THE ALLEGED BASIS FOR HER RETALIATION CLAIM OUTSIDE THE LIMITATIONS PERIOD.

Petitioner was apprised of the alleged basis for her retaliation claims outside the limitations period (prior to June 25, 2004). Thus, there is no basis for Petitioner to request that this Court employ a discovery rule to resurrect her time-barred allegations of retaliation. Therefore, this case does not present a full opportunity to consider whether Title VII suits are amendable to a discovery rule and the petition should be denied accordingly.

In her petition, Petitioner claims that she "had no reason to suspect the [time barred retalia-

tory] conduct [] harbored retaliatory animus until her supervisor [Scott Oglesby] denied his layoff statement and claimed there was no layoff plan." (Pet. at 18). Petitioner questioned the accuracy of Mr. Oglesby's layoff claims in May 2004, however, and therefore was aware or should have been aware *at that time* that his earlier, allegedly false layoff claim may have been motivated by retaliatory animus. (*Id.* at 123a-124a).

Given that Petitioner was aware that she may have been subject to retaliatory conduct outside the limitations period (May 2004), the Court should reject her request that the Court adopt, apply or even consider a 'discovery rule' to resurrect her time-barred retaliation allegations.[1]

[1] Respondents presume that the petition is limited solely to Count II (retaliation) of Petitioner's Second Amended Complaint. (Pet. at 45a, 48a). In the court of appeals Petitioner failed to raise any argument supporting an appeal on Count I. Therefore any appeal to this court on that count is waived.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

RAYTHEON COMPANY,
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